90-1170

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

RICHARD ROGER GARCIA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A. DID THE DISTRICT COURT ERR IN DENYING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT CONTAINED A FALSE OR MISLEADING STATEMENT INCLUDED EITHER KNOWINGLY AND INTENTIONALLY, OR WITH RECKLESS DISREGARD FOR THE TRUTH?

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Petitioner, RICHARD ROGER GARCIA, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I.

OPINION BELOW

This opinion from the Court of Appeals for the Ninth Circuit, which was not published, is attached hereto as Appendix A. Petitioner filed, on April 24, 1990 a Petition for Rehearing and a Suggestion for Rehearing *En Banc.* Said Petition for Rehearing was denied and the Suggestion for Rehearing *En Banc* was denied by order filed

October 18, 1990. No opinion was issued by the district court for the Central District of California, in which Mr. Garcia plead guilty.

II.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on April 10, 1990. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. section 1254(1).

III.

CONSTITUTIONAL PROVISION INVOLVED

United States Conostituion, Amendment IV:

"The right of the people to be secure . . . from unreasonable searches and seizures . . . shall not be abridged . . . "

IV.

STATEMENT OF FACTS

On July 22, 1988, the Appellant was arrested on charges of possessing an unregistered machine gun and silencer, after a search of his home pursuant to a search warrant.

The warrant was issued by the Honorable Judge Benjamin Aranda, Judge of the South Bay Municipal Court for the County of Los Angeles, based on an affidavit submitted by Torrance police officer James Mock. The affidavit contains an allegation that officer Mock obtained information from an alleged confidential and reliable informant that the appellant was selling drugs at the appellant's home. In further support of his affidavit, officer Mock

referred to two incidents which occurred approximately three years earlier, one involving the arrest of an acquaintance of the appellant, on a charge of rape, and the other, an overdose incident involving another acquaintance of the appellant.

V.

REASONS FOR GRANTING THE WRIT

The question presented involves the continuing vitality of the decision of this honorable Court in *Franks v. Delaware,* 438 U.S. 154 (1978), and the protection it affords criminal defendants from unreasonable searches and seizures.

VI.

THE MERITS

A. THE PETITIONER HAS MADE A PRELIMINARY SHOWING THAT THE SEARCH WARRANT AFFIDAVIT CONTAINED DELIBERATE OR RECKLESS OMISSIONS OF FACT SUFFICIENT TO WARRANT A HEARING UNDER *FRANKS v. DELAWARE*

Under *Franks v. Delaware,* 438 U.S. 154 (1978), a defendant is entitled to an evidentiary hearing upon a substantial preliminary showing that the warrant affidavit contains a false or misleading statement which was included in the affidavit either intentionally or with a reckless disregard for the truth — and that the statement was material to a finding of probable cause. The standard to be applied at such a hearing is proof by a preponderance of the evidence. *Id.* at 155-156.

Further, the defendant is entitled to have the fruits of the search excluded from evidence if he established the above elements.

B. *UNITED STATES V. STANERT*, 762 F.2d 775, 781 MANDATES AN EVIDENTIARY HEARING IF THE WARRANT AFFIDAVIT INTENTIONALLY OR RECKLESSLY *"TENDS TO MISLEAD"* THE ISSUING MAGISTRATE.

The *Stanert* opinion makes very clear that the Court's concern, in requiring an evidentiary hearing when the warrant affidavit contains deliberate or reckless omissions that "tend to mislead," was that police might attempt to manipulate those in the judiciary by presenting artfully-written affidavits and bending the truth so as to make their hunches seem reasonable and well-grounded.

"By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner would denude the probable cause requirement of all real meaning. Clear proof of deliberate or reckless omission is not required. Such proof is reserved for the evidentiary hearing. At this stage, all that is required is that the defendant make a substantial preliminary showing that the affiant deliberately or recklessly omitted facts necessary to prevent technically true statements from being misleading." *U.S. v. Stanert,* 762 F.2d 775, 781 (9th Cir., 1985) (citations omitted).

What this language in *Stanert* suggests is that the "deliberateness" or "intentionality" of misstatements may be established through a kind of commonsense look at the whole of the affidavit: Do the inaccuracies seem innocent? Or is the officer *trying* to mislead the magistrate?

The petitioner has pointed out a very telling and significant misstatement: That the affidavit refers to a "drug investigation" of an acquaintance of the appellant (which was said to have led to the issuance of a search warrant) and yet fails to inform the magistrate that the acquaintance was apprehended pursuant to an arrest warrant for an unrelated (to the alleged drug investigation) *rape* reported to have occurred earlier that same day. The affiant-policeman failed to include the part about the rape arrest because it would destroy the consistency and rhetorical effect of his affidavit: The officer starts by saying there was a drug investigation, then falsely reports a rape arrest as one involving drugs, then reports that drug paraphernalia were found. What the officer did, then, is *exactly* what *Stanert* denounces: He deliberately omits a fact necessary "to prevent technically true statements from being misleading." *Id.* at 781.

The above-quoted language from *Stanert* makes clear that the Court is concerned not only with the obviously intentional falsehoods, but also with the prospect that magistrates might be misled through subtleties of construction in warrant affidavits.

That aspect of the *Stanert* opinion, when compared to the types of falsehoods present in the affidavit involved in this case, makes clear that the petitioner was entitled to an evidentiary hearing under *Franks v. Delaware, supra.*

VII.

CONCLUSION

For the foregoing reasons, RICHARD ROGER GARCIA respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

By BRUCE COLODNY
Attorney for Petitioner
RICHARD ROGER GARCIA

DATED: January 16, 1991

APPENDIX A

No. 89-50000

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD ROGER GARCIA,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief Judge, Presiding
Submitted March 16, 1990**

D.C. No. CR-88-690-R

MEMORANDUM*

Before: BROWNING, ALARCON and POOLE, Circuit Judges.

Pursuant to a conditional plea of guilty, Richard Roger Garcia appeals his conviction for possession of an unregistered machine gun and silencer, in violation of 21 U.S.C. §§ 5861(d) and 5871. Garcia contends that the district court erred by denying his motion to suppress evidence found during the search of his home and by refusing his request for an evidentiary hearing to chal-

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed.R.App. P.34(a); Ninth Cir. R. 34-4.

lenge the veracity of the affidavit in support of the search warrant. We have jurisdiction under 28 U.S.C. § 1291 and we affirm in part and reverse and remand in part.

Garcia contends that the district court erred by denying his request for an evidentiary hearing under *Franks v. Delaware,* 438 U.S. 154 (1978). This contention lacks merit.

"In *Franks,* the Supreme Court held that a defendant could challenge a facially valid affidavit by making a substantial preliminary showing that '(1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit purged of its falsities would not be sufficient to support a finding of probable cause.' " *United States v. Stanert,* 762 F.2d 775, 780 (9th Cir. 1985) (quoting *United States v. Lefkowitz,* 618 F.2d 1313, 1317 (9th Cir.), *cert. denied,* 449 U.S. 824 (1980)), *modified,* 769 F.2d 1410 (9th Cir. 1985). "Where the defendant makes such a showing, the Fourth Amendment requires that a hearing be held at the defendant's request." *Stanert,* 762 F.2d at 780 (citing *Franks,* 438 U.S. at 155-56).

Here, the affidavit in support of the search warrant for Garcia's home states that on March 9, 1985, police officers executed a search warrant at the home of Charles Holt, an acquaintance of Garcia. This statement is incorrect because on March 9, 1985, police officers were serving an arrest warrant for Holt and gained access to search Holt's home by third party consent.[1]

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[1]The affidavit describes citizen complaints received by the police concerning drug sales by Garcia and Holt in an alley adjacent to a school near Garcia's home. The affidavit further states that "Officer Vanderpool developed sufficient information for a search warrant for the residence of Charles Holt.... Officers served the search warrant

There is no evidence, however, that the affiant's incorrect reference to a search warrant rather than an arrest warrant was made intentionally, or with reckless disregard for the truth. The affiant obtained this misinformation from an officer of another police department. At the district court hearing on Garcia's motion to suppress, this police offricer testified that he mistakenly informed the affiant that a search warrant had been executed at Holt's home. Furthermore, the police report for this incident mistakenly referred to a "drug arrest and investigation" at Holt's home.

Garcia did not make a "substantial preliminary showing" that (1) the affidavit contained an intentional or reckless false statement, or (2) the affidavit purged of the inaccurate statement would not be sufficient to support the finding of probable cause. *See Stanert,* 762 F.2d at 780. Therefore, district court's refusal to hold a *Franks* hearing to allow Garcia to question the affiant was no error.

II

Garcia contends that the district court erred by denying his motion to supress evidence seized at his residence pursuant to the search warrant. He challenges the magistrate's determination that the affidavit in support of the search warrant established probable cause for the search. This contention lacks merit.

"We may not reverse a magistrate's finding of probable cause unless it is clearly erroneous. We need only find

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on the residence of Charles Holt and found paraphernalia associated with the packaging and sales of small amounts of cocaine." The affidavit also correctly states that during this search, Garcia was seen driving away from Holt's residence and subsequently was arrested for carrying a loaded weapon.

that under the totality of the circumstances the magistrate had a substantial basis for concluding that probable cause existed." *United States v. McQuisten,* 795 F.2d 858, 861 (9th Cir. 1986) (citations omitted). " 'To credit a confidential source's information in making a probable cause determination, the affidavit should support an inference that the source was trustworthy and that the source's accusation of criminal activity was made on the basis of information obtained in a reliable way.' " *United States v. Stanert,* 762 F.2d 775, 780 (9th Cir. 1985) (quoting *United States v. Landis,* 726 F.2d 540, 543 (9th Cir.), *cert. denied,* 467 U.S. 1230 (1984)), *modified,* 769 F.2d 1410 (9th Cir. 1985). *See also United States v. Freitas,* 716 F.2d 1216, 1221 (9th Cir. 1983) (if informant spoke with personal knowledge, report is generally considered reliable enough to support a finding of probable cause).

Here, the affidavit contains information from a confidential informant that supports a finding of probable cause. The informant stated that he had witnessed Garcia sell cocaine to a third person at Garcia's home. This sale occurred within five days of the issuance of the search warrant. The informant also accurately described Garcia's physical appearance, his address, and the truck he drove. The affidavit further states that the purchaser of the cocaine told the informant that "cocaine can be purchased from [Garcia] at this address at almost any time as he maintains an ample supply for sale." Finally, the affidavit states that this informant had provided reliable information on several occasions within three months of the drafting of the affidavit.

We conclude that based on this information from a previously reliable informant with personal knowledge, the magistrate had a substantial basis for finding that

probable cause for the search existed. *See McQuisten,* 795 F.2d at 861. The affidavit supports an inference that the informant was trustworthy and that his information was obtained in a reliable way. *See Stanert,* 762 F.2d at 779; *Freitas,* 716 F.2d at 1221.[2]

III

Finally, although Garcia did not raise the issue on appeal, we have held 18 U.S.C. § 3013, the statute authorizing imposition of a special assessment fee, to be unconstitutional. *United States v. Munoz-Flores,* 863 F.2d 654, 661 (9th Cir. 1988), *cert. granted,* 110 S. Ct. 48 (1989). We raise this issue sua sponte, and reverse and remand to the district court with instructions to vacate the special assessment fee of $50 included in Garcia's sentence. *See United States v. Hoyt,* 888 F.2d 1257, 1258 (9th Cir. 1989).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

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[2]The affidavit also contains information regarding three other incidents in which Garcia was linked to the use, possession or sale of illegal narcotics. Garcia argues that this information cannot support a finding of probable cause because these incidents occurred up to three years before the search warrant was issued. We have held, however, that "[t]he mere lapse of substantial amounts of time is not controlling in a question of staleness." *Dozier,* 844 F.2d at 707. Moreover, even if this information were redacted, the informant's report of a drug sale by Garcia within five days of the issuance of the search warrant is sufficient to support the magistrate's finding of probable cause.